Filed 4/15/19 Anaya v. Kelly CA1/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

DARLENE M. ANAYA, Plaintiff and Appellant, v. DENNIS KELLY et al., Defendants and Respondents.	A151657 (San Francisco County Super. Ct. No. CGC-16-550412)

Darlene Anaya, a 71-year-old school teacher who is half-Hispanic, half-Native American, was elected to serve a three-year term in a part-time position with her union. Following completion of her term, Anaya sued the union and its president, alleging seven California Fair Employment and Housing Act (FEHA)-based claims. The essence of the claims were that defendants discriminated against her and failed to accommodate her disability (a limp that made walking difficult), claiming that defendants treated her differently from her predecessor in several respects, including as to access to a parking space and her office and the amount of her stipend. The trial court granted summary judgment for defendants, concluding that none of Anaya's claims had merit. We reach the same conclusion, and we affirm.

BACKGROUND

The Parties and the General Setting

Appellant Darlene Anaya is a classroom teacher in the San Francisco Unified School District. She is half-Hispanic and half-Native American, and describes herself as disabled, as she has difficulty walking with what she calls a "very noticeable and obvious

limp." She is a member of the United Educators of San Francisco (UESF), and in 2012 was elected to a position in the union in which she served from July 2012 to June 2015. She was 68 years old when her term began, 71 when it ended.

The Proceedings Below

On February 16, 2016, eight months after her term ended, Anaya filed her complaint. It named two defendants, UESF and its president Dennis Kelly (when referred to collectively, defendants), and alleged seven causes of action: (1) disability, (2) race, and (3) age discrimination; (4) failure to reasonably accommodate; (5) failure to engage in good faith interactive process; (6) failure to prevent harassment and/or discrimination; and (7) hostile work environment.

The introduction to Anaya's complaint identified her as a "former employee" of UESF, going on to describe her background in more detail: a "classroom teacher and a long-time labor and union advocate" who, "[i]n her work with various labor organizations, . . . has worked to support, among other things, the housing needs of San Francisco's teachers; to preserve the City College of San Francisco; and to address ongoing issues surrounding education reform. She has participated in numerous campaigns, rallies, and phone banking sessions in support of labor causes and worker's rights.

"3. For example, Plaintiff served as a Member Service Specialist for several years in association with the American Federation of Teachers (AFT), where she helped teachers and others resolve problems at their schools by providing information and assistance.

"4. She is a three-time elected delegate to the annual National Education Association (NEA) convention, where current education and labor issues facing our county's schools and teachers are discussed.

"5. She is also a five-time elected delegate to the California Federation of Teachers (CFT) convention. As a delegate to the convention, she assisted in reviewing legislation, supporting proposed resolutions, and helped fight classroom and budget cuts to education."

Anaya's "employment" at UESF was as a result of her having won an election to a three-year term as "Vice-President of Substitutes," in which position she was responsible for assisting substitute teachers employed by the San Francisco Unified School District with any employment concerns. As her opening brief puts it, "Ms. Anaya would answer telephone calls from substitute teachers, respond to their questions, and use the union contract to advocate on their behalf. [Citation.] Ms. Anaya also performed other duties as necessary."[1]

While serving in her part-time position, Anaya continued in her full-time position as a classroom teacher.

Paragraphs 15 through 18 of Anaya's complaint set forth the factual allegations supporting her claims, which included that she was a senior citizen, Hispanic, and with a "disability and/or medical condition" covered by FEHA. These specific allegations followed:

"19. Throughout her employment, Plaintiff was subjected to illegal discriminatory and harassing conduct by defendant UESF and its former president, defendant KELLY.

"20. The extent of the discrimination, harassment and misconduct by defendants will be borne out through discovery, but includes, *inter alia*,

"a) Defendants discriminated against Plaintiff by, among other things, exhibiting favoritism towards other employees; scrutinizing and monitoring Plaintiff's access to the office; denying Plaintiff the same wages provided to other similarly situated employees; and denying Plaintiff the benefits provided to other similarly situated employees.

"b) For example, Plaintiff was not given a key to defendant UESF's offices despite a policy or practice of other employees being given a key. On one occasion,

[1] Anaya had prior experience at UESF representing substitute teachers in 2005, specifically as a member service specialist for approximately three years in a program funded by the American Federation of Teachers. In this position, Anaya had worked alongside Sandra Mack, the vice president of substitutes at UESF at the time, and learned how to apply the union contract as it applied to substitute teachers, and generally represented them.

Plaintiff, who is disabled and elderly, fell and injured herself while outside and trying to get the attention of other employees to open the door. Plaintiff was treated at urgent care and required medication for the fall.

"c) Plaintiff's access to defendant UESF's offices was monitored and scrutinized by defendants and she was not allowed in the building unless other employees were present.

"d) Plaintiff was paid less than similarly situated employees.

"e) Plaintiff was denied benefits provided to other similarly situated employees.

"f) Defendants knew or perceived that Plaintiff had a disability and/or medical condition, but failed to accommodate Plaintiff.

"g) A reasonable accommodation was available, including, among other things, regular access to the UESF office and a parking space.

"h) Defendants failed to make reasonable accommodations despite Plaintiff requesting the accommodation and/or defendant being aware of the need for accommodations."

On April 18, 2016, defendants filed an answer, and thereafter engaged in discovery, which included interrogatories to Anaya and her deposition.

On January 20, 2017, defendants filed their motion for summary judgment or in the alternative summary adjudication, set for hearing on April 7. The motion was accompanied by a 75-page separate statement, over 300 pages of supporting evidence, and five declarations, those of: Kelly, president of UESF from June 2003 to June 2015; Elizabeth Conley, twice elected to the position of Vice President Substitutes, her first term being from mid-2009 to mid-2012, the second from mid-2015 to mid-2018, and thus the immediate predecessor of, and immediate successor to, Anaya; Carolyn Samoa, a vice president for United Support Personnel at UESF; Tom Lacey, an employee at UESF in charge of locking the doors to the office; and Eric Hall, a former senior field representative at UESF.

On March 24, Anaya filed her opposition, which included a 13-page memorandum of points and authorities, and two declarations: a four-page, 28-paragraph declaration of

Anaya, and one from her attorney, whose declaration attached, and purported to authenticate, 10 items.

Defendants filed a reply, and the motion came on as scheduled on April 7. Following the hearing, the trial court entered a lengthy order granting summary judgment, from which Anaya appealed.

DISCUSSION

Summary Judgment Law and the Standard of Review

Code of Civil Procedure section 437c, subdivision (c) provides that summary judgment is properly granted when there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. As applicable here, moving defendants can meet their burden by demonstrating that "a cause of action has no merit," which they can do by showing that "[o]ne or more of the elements of the cause of action cannot be separately established . . . ." (Code Civ. Proc., § 437c, subd. (o)(1); see also *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 486–487.) Once defendants meet this burden, the burden shifts to plaintiff to show that a triable issue of material fact exists as to that cause of action. (Code Civ. Proc., § 437c, subd. (p)(2); see *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849–850, 853–854 (*Aguilar*).) A material fact is one that relates "to the issues in the case as framed by the pleadings. [Citation.] There is a genuine issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 860 (*Serri*).)

On appeal, "[w]e review a grant of summary judgment de novo; we must decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. [Citations.]" (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348.) Put another way, we exercise our independent judgment, and decide whether undisputed facts have been established that negate plaintiff's claims. (*Romano v. Rockwell Internat., Inc.*, *supra*, 14 Cal.4th at p. 487.) As we put it in *Fisherman's Wharf Bay Cruise Corp. v. Superior Court* (2003) 114 Cal.App.4th 309, 320: "[W]e exercise an

independent review to determine if the defendant moving for summary judgment met its burden of establishing a complete defense or of negating each of the plaintiff's theories and establishing that the action was without merit." (Accord, *Certain Underwriters at Lloyd's of London v. Superior Court* (2001) 24 Cal.4th 945, 972.)

But other principles guide us as well, including that " '[w]e accept as true the facts . . . in the evidence of the party opposing summary judgment and the reasonable inferences that can be drawn from them.' " (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 67.) And we must " 'view the evidence in the light most favorable to plaintiff[] as the losing part[y]' and 'liberally construe plaintiff['s] evidentiary submissions and strictly scrutinize defendant['s] own evidence, in order to resolve any evidentiary doubts or ambiguities in plaintiff['s] favor.' " (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 96–97.)

Finally, we note that if Anaya's opposition " ' "rests merely upon conclusory allegations, improbable inferences, [or] unsupported speculation," summary judgment may be appropriate even where intent is an issue.' " (*Nelson v. United Technologies* (1999) 74 Cal.App.4th 597, 614.) In sum, even though we may not weigh Anaya's evidence or inferences against that of defendants as though we were sitting as the trier of fact, we "must nevertheless determine what any evidence or inference *could show or imply to a reasonable trier of fact.*" (*Aguilar, supra,* 25 Cal.4th at p. 856.)

Applying those principles here leads to the conclusion that the trial court was correct and that the summary judgment must be affirmed.

None of Anaya's Claims Has Merit

As noted, Anaya's complaint alleged seven causes of action, and we analyze them on a cause-of-action by cause-of-action basis in the order pled by Anaya.[2]

[2] For some reason, Anaya's brief addresses her causes of action in a random order, beginning with the fifth (for good faith interactive process), followed by the fourth (reasonable accommodation), then by the three discrimination claims, then by the seventh (hostile work environment), and finally by the sixth (failure to prevent harassment and/or discrimination).

The First, Second, and Third Causes of Action Have No Merit

Anaya's first three causes of action were for discrimination, respectively based on disability (first cause of action), race (second), and age (third). Anaya's brief lumps them together, arguing that the trial court erred in "holding that there were no triable issues of material fact regarding Ms. Anaya's discrimination claim."

Generally speaking, a plaintiff in a discrimination claim must prove (1) she was a member of a protected class; (2) she was qualified for the position sought or was performing competently in the position held; (3) she suffered an adverse employment action; and (4) some other circumstances suggesting discriminatory motive. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355 (*Guz*); see generally CACI No. 2570 [age discrimination].)

Defendants' motion described and distilled Anaya's claims as had been set forth in her complaint and/or as Anaya had described in discovery, essentially that defendants exhibited "favoritism towards other employees," "denying [Anaya] the benefits provided to" other similarly situated employees. Going on, defendants' distillation described that Anaya contended they subjected her to the following discriminatory conduct:

— "Scrutinizing and monitoring [her] access to the office," including by not providing her "a key" to the office or "the code to the building alarm," and not allowing her to be in the office "without other employees present";

— denying her a parking space;

— denying her a cell phone;

— paying her "less than similarly situated employees," including Conley and Samoa, and paying her "less in salary, stipends, and bonuses"; and

— not allowing her to attend banquets.

Anaya's opposition agreed with defendants' description as to what she was claiming—and then some. That is, Anaya's opposition attempted to add several other claims of discrimination because defendants did not offer her various benefits, including: (1) a cost of living increase or raise; (2) paid vacation time; (3) paid sick leave; (4) money for training or education; (5) mileage reimbursement; (6) car insurance

reimbursement; and (7) summer employment. This was improper. And unavailing to Anaya.

The pleadings set the boundaries of the issues to be decided on summary judgment. (*Oakland Raiders v. National Football League* (2005) 131 Cal.App.4th 621, 648.) As confirmed in *Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570, 585. " 'A defendant moving for summary judgment need address only the issues raised by the complaint; the plaintiff cannot bring up new, unpleaded issues in his or her opposing papers.' " (See also *Keniston v. American Nat. Ins. Co.* (1973) 31 Cal.App.3d 803, 812 [summary judgment declarations "must be directed to the issues raised by the pleadings"].) So, a plaintiff wishing "to rely upon unpleaded theories to defeat summary judgment" must move to amend the complaint before the hearing. (*Leibert v. Transworld Systems, Inc.* (1995) 32 Cal.App.4th 1693, 1699.)

Anaya did not do this, and so she is not permitted to assert these late-based claims. And thus we analyze her claims based on what she pleaded and contended in discovery.

Addressing Anaya's first three causes of action, for disability, race, and age discrimination, defendants' motion argued that the claims failed as a matter of law, on three grounds: (1) Anaya could not establish a prima facie case of age discrimination because there was no evidence of circumstances suggesting discriminatory motive; (2) Anaya could not establish a prima facie case of any discrimination because most of the discriminatory actions alleged were not adverse employment actions; and (3) defendants met their burden to produce evidence of legitimate/non-discriminatory reasons for the alleged conduct, and Anaya could not meet her burden of producing substantial evidence showing both that defendants' stated reasons are false and discrimination was the real reason. The trial court agreed with defendants on all three bases, concluding as follows: "Anaya failed to present specific and substantial evidence showing that animus based on age, race, or disability motivated Defendants' conduct," and that "[t]he evidence considered as a whole is insufficient to raise a triable issue of material fact that the Defendants' conduct was motivated by animus based on Anaya's age, race, or disability." We reach the same conclusion.

To begin with, we note that Anaya's opposition did not address most of defendants' arguments: she failed to point to any evidence or circumstance suggesting discriminatory motive as to her age discrimination claim, and she also did not respond to defendants' arguments that the majority of the allegedly discriminatory actions were not adverse employment actions. Not only did Anaya point to no fact or circumstance suggesting discrimination based on age, her response to the interrogatory that asked her to set forth all facts supporting her denial to a request for admission that defendants did not discriminate against her admitted she had no reason to believe Kelly had a bias towards people over the age of 40. Indeed, Anaya testified at deposition that she did not think any action Kelly took towards her, or statements he made to her, were because she was a person over the age of 40. Here, like her opposition below, Anaya's opening brief does not address the trial court's dismissal of her age discrimination claim at all.[3]

As to the race discrimination claim, section J of Anaya's brief says this:

"J. Evidence of racial animus against Hispanics

"Ms. Anaya testified that she believed she was treated differently because she is Hispanic. [Citation.] Ms. Anaya also testified regarding negative interactions that occurred only between Mr. Kelly and other Hispanic individuals. [Citation.] In one instance she witnessed Mr. Kelly get into a heated argument with a Hispanic substitute teacher, Mr. Lagos. [Citation.] It was a 'shouting match' and a 'huge . . . altercation.' [Citation.] The incident was in public with other people around. [Citation.] Mr. Kelly went so far as to call security to 'have Mr. Lagos removed.' [Citation.] She also testified regarding another dispute Mr. Kelly had with another Hispanic individual, Roberto Michel. [Citation.] Ms. Anaya testified that she had never saw [*sic*] Mr. Kelly have disputes with anybody else of any other ethnicity."[4] Beyond this conclusory claim that

[3] In fact, at oral argument Anaya's counsel said she was conceding the age discrimination claim.

[4] A second paragraph in section J said this: "At her deposition, Ms. Anaya testified regarding her employment, 'I had a very difficult three years as an officer. I used to cry. I used to go home and cry because—and I know my daughter said, 'Mom, this is taking it toll [*sic*] on you,' you know, 'maybe you should resign.' And I said,

Kelly had animus towards Hispanics based on claimed conflicts she witnessed between him and two Hispanic members of UESF regarding internal elections, Anaya's "evidence" was her vague statement that: "We didn't ever have before that time any employees that were Hispanic," in reference to the time period before 2009 or 2012, and her speculation on "how vigorously [Kelly] would defend a Hispanic person as opposed to some other ethnicity." Anaya's subjective belief that Kelly had animus towards Hispanics is at best rank speculation. It is manifestly insufficient.

Finally, as to her disability discrimination claim, Anaya was asked whether there were statements or actions taken by Kelly that made her think he had animus or a negative view of her because she had a medical condition or disability. Her answer: "I really don't know."

As to defendants' second basis for summary judgment, the lack of adverse employment actions, the trial court ruled that of the discriminatory conduct alleged by Anaya, "[o]nly the allegations of differences in Anaya's pay and benefits constitute actionable adverse employment actions." As to this, the court held, "Defendants present[ed] evidence that there were legitimate nondiscriminatory reasons for the differences in Anaya's pay and benefits." And, the trial court added, "although the denial of a key, alarm code, or permission to stay late at the office do not amount to actionable adverse employment actions, Defendants present[ed] evidence that there were legitimate nondiscriminatory reasons for those actions as well."

In *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1054–1055 (*Yanowitz*)—a case, not incidentally, cited by Anaya on several occasions—the Supreme Court observed as follows: "As the high court recognized in *Harris* [*v. Forklift Systems, Inc.* (1993) 510 U.S. 17], the determination of what type of adverse treatment properly should be considered discrimination in the terms, conditions, or privileges of employment is not, by its nature, susceptible to a mathematically precise test, and the significance of

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'Well, I'm not a quitter,' but I used to cry because, you know, I was treated differently. I felt like an outsider. I felt un-trusted. I felt unwanted. . . ." This, of course, has nothing to do with race.

particular types of adverse actions must be evaluated by taking into account the legitimate interests of both the employer and the employee. Minor or relatively trivial adverse actions or conduct by employers or fellow employees that, from an objective perspective, are reasonably likely to do no more than anger or upset an employee cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment and are not actionable, but adverse treatment that is reasonably likely to impair a reasonable employee's job performance or prospects for advancement or promotion falls within the reach of the antidiscrimination provisions of [Government Code] sections 12940(a) and 12940(h)." Or, as *Yanowitz* earlier described it, in discussing Title VII, an "employee must demonstrate that he or she has been subjected to an adverse employment action that materially affects the terms, conditions, or privileges of employment, rather than simply that the employee has been subjected to an adverse action or treatment that reasonably would deter an employee from engaging in the protected activity." (*Id.* at p. 1051.)

In *Thomas v. Department of Corrections* (2000) 77 Cal.App.4th 507, the court observed that " '[w]ork places are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to the level of a materially adverse employment action.' " And, the court continued, an adverse employment action must be " 'more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits [or] significantly diminished material responsibilities . . . .' [Citation.] The employment action must be both detrimental and substantial." (*Id.* at p. 511; accord, *Malais v. Los Angeles City Fire Dept.* (2007) 150 Cal.App.4th 350, 357 ["Not every change in the conditions of employment, however, constitutes an adverse employment action. ' "A change that is merely contrary to the employee's interests or not to the employee's liking is insufficient." ' "].)

To sum up, except for the claimed discrepancy in the stipend she was paid, none of Anaya's claims of disparate treatment involves an adverse working condition. But not only were the claimed items of discrimination not adverse working conditions under the law, they had no effect on Anaya's ability to do her job.

As to the key, Anaya admits that she "worked more in the field and at home" than at the UESF office; that on average she worked for UESF between 20 and 30 hours a week, most of which were from home; that she usually worked at the UESF office from 3:30 p.m. to 6:30 p.m. three days a week; and that the doors to the office were unlocked if she arrived prior to 5:00 p.m. (which she did not find difficult to do).[5]

As to the claimed decision not to allow Anaya in the office when others were not present, Anaya states she "tried to work from 3:30 to 5:30 minimum at the office," and could not stay later due to her perceived lack of access. This is at best an inconvenience, and again, we note, most of her work was done out of the office.

As to the alarm code, Anaya conceded that in the past she had the code and she never asked for it again. Moreover, had she asked, Kelly would have told her it never changed. Finally, as Anaya admitted, access to the alarm code had nothing to do with her "staying at the office."

As to the alleged failure to provide Anaya with assigned parking, it made no material change to Anaya's working conditions. Again, this was at most an inconvenience. (See *Hardin v. Wal-Mart Stores, Inc.* (E.D. Cal. 2011) 813 F.Supp.2d 1167, 1171 [threats that a supervisor allegedly made to an employee to stop parking in the disabled parking area where the employee had previously parked did not constitute an

[5] Anaya could recall only three instances where she found herself locked out of the UESF office prior to 5:00 p.m., only one of which she could place on a specific date. That one instance occurred when Anaya left the office a little before 5:00 p.m. to make a trip to her car, found she was locked out when she returned, threw pebbles and then her key at a window to get someone's attention, and then fell. Anaya stated in a January 22, 2013 email to Kelly that this fall took place January 17, and that the office doors were locked at 5:10 p.m. Anaya could not remember the date when she was locked out on the other two occasions, but stated she "usually would wait," but could not call because she did not have a cell phone.

adverse employment action because the change was an inconvenience rather than a material loss of benefit].) And while Anaya at times had to park some blocks away, she admitted at deposition that there was no single instance where she could not find parking.

Further, denial of an assigned spot did not mean, as Anaya suggests, that she did not have access to the garage parking spots assigned to union members. Anaya admits Kelly sent her an email on January 22, 2013, shortly after the fall outside the office, informing her that "[p]eople who don't have parking places frequently call ahead and ask if there is an open spot in the garage due to an illness or someone being out at a site for the end of the day," and advising that perhaps they should arrange for her to have the same allowance for a cell phone that other staff members have. Despite Anaya's claim that her access to the garage was critical, she admitted she did not follow up on this offer to explore with Kelly the possibility of a cell phone allowance.

Finally, to Anaya's claim that defendants' discriminatory conduct included not allowing her to attend banquets, Anaya testified she was told she would have to check with Kelly regarding a signup sheet for certain banquets. As to this, Kelly explained that officers and staff could sign up to attend any banquet via a signup sheet kept at the UESF office; and to Kelly's knowledge, all signup sheets were also passed around at the executive board meetings in which Anaya participated. Kelly never prohibited Anaya from attending a banquet; was not aware of any banquet she was prohibited from attending during her tenure; and in fact Anaya regularly attended banquets while she was Vice President Substitutes.

On appeal, Anaya does not directly address the court's conclusions that most of the allegedly discriminatory acts were not adverse employment actions. Instead, she asserts that the court erred because the court "should not individually assess whether each alleged adverse employment action constitutes an adverse employment action in and of itself." Making such an argument, Anaya cites several times to *Yanowitz*, *supra*, 36 Cal.4th 1028, which she describes as holding that adverse employment actions must be considered "collectively." But *Yanowitz* is a retaliation case, and it is such cases the Supreme Court has said must be reviewed collectively. (See, for example, *Yanowitz*, at

p. 1055 ["pattern of systematic retaliation"]; p. 1058 ["retaliatory course of conduct"].) Anaya does not allege retaliation.

While it was not necessary below, or here, Kelly also explained that there were good reasons for what Anaya asserted were items of disparate treatment. Thus, for example, as to the cell phone, the UESF staff and officers who used their personal cell phone received a stipend, not a cell phone. In an email Kelly sent to Anaya on January 22, 2013, he brought up the possibility of giving her a cell phone stipend. Kelly explained that Anaya told him she did not have a cell phone, and in response he suggested that "despite [her] shorter work time," "[p]erhaps we should arrange for [her] to have the same allowance for a cell phone that other staff members have . . . so she could be in better contact with the office and know if there are available parking spots in the afternoon when she arrived. As noted, Anaya never followed up on Kelly's suggestion. And had she done so, Kelly would have given Anaya a cell phone stipend.

As to the lack of a key, no part-time employees at UESF had a key to the front glass door or to the second floor office door. These individuals, like Anaya, did not regularly arrive in the morning, and thus did not need keys. Kelly also testified that he did not recall any conversation in which Anaya asked him for any key to the building or office, and had he realized Anaya felt she needed a key, he would have given her one.

As to the alarm code, Kelly was not aware that Anaya did not have the code or wanted it, and Anaya never asked him for it. He knew Anaya had the alarm code in 2005 (when she worked with UESF in a different capacity) and that between June 2003 and June 2015 the alarm code never changed.

As to the issue of assigned parking, Kelly's decision was based on the fact she worked only part-time and, historically, the people who worked part-time were never given assigned parking, as the limited available parking in the office garage was assigned only to full-time staff. In fact, not even all full-time staff could be offered assigned

parking in the garage.[6] In sum, Anaya's claims of discrimination included five items, four of which were not adverse employment actions, failing Anaya's burden at the first stage of the analysis.

The above leaves only the pay and benefits issue as the basis for the discrimination claim. And as to this, Anaya compares herself primarily to Conley who served as Vice President of Substitutes from 2009–2012, immediately preceding Anaya's term. As Anaya describes it, "Ms. Conley performed the same work and had the same responsibilities as laid out under the UESF constitution and bylaws. [Citation.] The number of substitute teachers that Ms. Anaya and Ms. Conley were responsible for stayed roughly the same during their respective tenures as Vice President of Substitutes. [Citation.] [¶] Ms. Conley was paid a $1,000.00 monthly stipend during her employment as Vice President of Substitutes. [Citation.] Ms. Anaya was paid a $200 monthly stipend during her employment as Vice President of Substitutes. [Citations.] Ms. Conley was permitted to consistently work three days a week. [Citation.] Ms. Anaya was never allowed to work more than two days a week. [Citations.] Working two days a week was not enough time for Ms. Anaya to complete her duties in the office and it was necessary for Ms. Anaya to work evenings and weekends to keep up with her work, time that she was not compensated for. [Citations.] Ms. Conley was permitted to work over the summer. [Citation.] Ms. Anaya was not permitted to work over the summer. [Citations.] [Fn. omitted.]"

Beyond the stipend issue, Anaya also contends that Conley had a key, while Anaya did not, and also had "the benefit of an employment contract," while Anaya did not. As Anaya sums up: "The contractual benefits that Ms. Conley was contractually entitled to during her first term as Vice President of Substitutes included a cell phone

[6] Notably, Anaya's lack of an assigned spot in the garage did not mean she could not park there on occasion. Throughout Anaya's term as vice president of substitute teachers, there was a swing parking spot that individuals who did not have assigned parking could sometimes use. In his email of May 7, 2014, Kelly offered Anaya a garage key so she could check to see if the swing spot or an assigned spot was available.

stipend, paid vacation time, paid sick time, mileage reimbursement, automobile insurance reimbursement, and a training and education fund. [Citation.] Ms. Conley's benefits were consistent with the benefits provided to other Vice Presidents of UESF. [Citation.] Ms. Anaya did not receive, nor was offered, any of these benefits."

Kelly testified at length as to why Conley was given a larger stipend than Anaya, essentially because she had more skills, was more available, had less paid time off, and had fewer benefits because she was a retired employee of the school district. By contrast, Anaya had fewer skills and training, she was not as available, and was still a full-time employee of the school district who received benefits from it. Kelly also explained that Samoa received more pay and other benefits than Anaya because Samoa held a completely different position with different responsibilities based on the needs of the membership she represented.

In light of this, Anaya's claim fails under the three-step analysis required by *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 for allocating burdens of proof and producing evidence, which Anaya necessarily concedes is used in California for disparate-treatment cases under FEHA. Under that analysis, the employee must first present a prima facie case of discrimination. The burden then shifts to the employer to produce evidence of a nondiscriminatory reason for the adverse action. At that point, the burden shifts back to the employee to show that the employer's stated reason was in fact a pretext for a discriminatory act. (See *Guz, supra*, 24 Cal.4th at p. 333.)

Following *Guz*, numerous cases have held that "It is not sufficient for an employee to make a bare prima facie showing or to simply deny the credibility of the employer's witnesses or to speculate as to discriminatory motive. [Citations.] Rather it is incumbent upon the employee to produce 'substantial responsive evidence' demonstrating the existence of a material triable controversy as to pretext or discriminatory animus on the part of the employer." (*Serri, supra*, 226 Cal.App.4th at p. 862; accord, *Soria v. Univision Radio Los Angeles, Inc, supra*, 5 Cal.App.5th at p. 591.) "The employee's 'subjective beliefs . . . do not create a genuine issue of fact; nor do uncorroborated and self-serving declarations.' [Citations.] The employee's evidence must relate to the

motivation of the decision makers and prove, by nonspeculative evidence, 'an actual causal link between prohibited motivation and [the adverse action].' " (*Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1159, quoting *King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 433; see generally *Hicks v. KNTV Television, Inc.* (2008) 160 Cal.App.4th 994, 1003 [employee must show employer's stated reason for allegedly discriminatory conduct false and that real reason is discrimination].)

As we explained in *Morgan v. Regents of University of California*, *supra*, 88 Cal.App.4th at p. 75: "At this point, to avoid summary judgment, [Anaya] had to ' "offer substantial evidence that the employer's stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence the employer acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination." ' [Citation.] An employee in this situation can not 'simply show the employer's decision was wrong, mistaken, or unwise. Rather, the employee " 'must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them "unworthy of credence," [citation], and hence infer "that the employer did not act for the [. . . asserted] non-discriminatory reasons." [Citations.]' [Citations.]" [Citation.]' " (Accord, Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2017) ¶¶ 5:1650–5:1652, p. 5(II)-31.) This, she failed to do.

Anaya appears to disagree with Kelly's stated reasons for differences in Anaya's pay and benefits as compared to Conley. But the wisdom of Kelly's decisions is not at issue here. As the leading practical treatise puts it, "It is *not* enough for the employee to raise triable issues of fact concerning whether the employer's reasons for taking the adverse action were sound (e.g., refuting claims of poor job performance): 'The employee cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent or competent.' [*Hersant v. California*

Dept. of Social Services[(1997)] 57 [Cal.App.4th 997,] 1005 . . . ; see also *Guz v. Bechtel Nat'l, Inc.* (2000) 24 [Cal.4th] 317, 358 . . . .]" (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2018) ¶ 10:268.30, p. 10-128.)

Finally, Anaya asserts that the trial court's "finding of legitimate nondiscriminatory reasons for the disparate treatment is contradicted by the trial court's finding of pretext," and that "the trial court's order cites material facts, but these same material facts were negated based on Ms. Anaya's showing of pretext." But this assertion conflates the last two stages of the three-stage burden shifting analysis, and mistakenly assumes that defendants' burden to produce a legitimate, non-discriminatory reason for the allegedly discriminatory conduct is the same as Anaya's burden to produce substantial evidence of pretext.

The Fourth and Fifth Causes of Action Have No Merit

Under FEHA, an employer must engage in a "timely, good faith, interactive process" with a disabled employee to explore reasonable accommodations to accommodate a disability. (Gov. Code, § 12940, subd. (n).) Anaya's fourth cause of action alleged a failure to engage in this interactive process, and her fifth a failure to provide reasonable accommodation.

Failure to engage in the interactive process is a separate and independent FEHA violation from an employer's failure to provide a reasonable accommodation. (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 61 (*Gelfo*).) "While a claim of failure to accommodate is independent of a cause of action for failure to engage in an interactive dialogue, each necessarily implicates the other." (*Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 242.) And as *Gelfo* notes, "Two principles underlie a cause of action for failure to provide a reasonable accommodation. First, the employee must request an accommodation. [Citation.] Second, the parties must engage in an interactive process regarding the requested accommodation and, if the process fails, responsibility for the failure rests with the party who failed to participate in good faith. [Citation.]" (*Gelfo, supra,* at p. 54.)

In order to prove a claim for failure to engage, Anaya had to prove eight elements, among which are that she had a disability known to defendants and the failure to engage in the interactive process caused her harm. (See CACI No. 2546.) Anaya's position is that defendants knew of her disability and that they did not dispute that they failed to engage in the interactive process. In claimed support, Anaya asserts "it is undisputed that Ms. Anaya had mobility issues," that she had difficulty walking, which was a physical condition that limited a major life activity. (See *Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 311 [evidence that person required a cane to walk establishes disability].) As she puts it later in her brief, "At all relevant times during her employment with UESF, Ms. Anaya had a disability parking placard issued by the State of California. [Citation.] After her fall outside the UESF building, Ms. Anaya requested normal access to the UESF office and a parking space in the UESF building so she could be close to the office. Defendant/respondent UESF maintains parking spaces in its building, but Ms. Anaya was not provided with a space."

"FEHA's reference to a 'known' disability is read to mean a disability of which the employer has become aware, whether because it is obvious, the employee has brought it to the employer's attention, it is based on the employer's own perception—mistaken or not—of the existence of a disabling condition or, perhaps . . . the employer has come upon information indicating the presence of a disability." (*Gelfo, supra*, 140 Cal.App.4th at p. 61, fn. 21.) Defendants' position on this issue was that they were unaware of any limitation, quoting from Anaya's deposition to support their position. There, asked whether Kelly had knowledge of her disability or medical condition because he participated in meetings with a field representative who helped address her disability issues with the San Francisco Unified School District, Anaya testified, "I believe that he knew." Anaya also testified that she and Kelly "talked about it," that "he also has diabetes and he has mobility problems so we were just talking, yeah, it's kind of hard when you get older and you have all these things to deal with, and I know it's meant changes in my life and yours, so, yeah, he knew."

But whether Anaya's evidence was sufficient to put UESF on notice that Anaya had circumstances requiring a reasonable accommodation, one thing was certain, as her counsel admitted below: Anaya could perform her job. As Anaya's own brief describes it: "[I]t is not in dispute that Ms. Anaya was able to perform her job." That ends the inquiry. As Justice Chin's commentary puts it: "If a disabled employee can perform the essential functions of the job *without* reasonable accommodation, failure to provide an accommodation suggested by the employee or the employee's doctor (e.g., to make the position less stressful) does *not* support a claim for failure to provide reasonable accommodation. [*Hooper v. Proctor Health Care Inc.* (7th Cir. 2015) 804 [F.3d] 846, 852—disabled employee capable of performing essential job functions despite physical or mental limitations is qualified for the job, and thus 'employer's duty to accommodate is not implicated.']. " (Chin et al., Cal. Practice Guide: Employment Litigation, *supra*, ¶ 9:670, pp. 9-67 to 9-68.)

Beyond that, the record demonstrated that while defendants had no obligation to engage in the interactive process or provide a reasonable accommodation, they in fact attempted to grant Anaya the accommodations requested, especially as to a parking space. As shown above, Kelly sent Anaya an email on January 22, 2013, informing her that "[p]eople who don't have parking places frequently call ahead and ask if there is an open spot in the garage due to an illness or someone being out at a site for the end of the day," further advising that perhaps they should arrange for Anaya to have the same allowance for a cell phone that other staff members have, "despite [her] shorter work time." Kelly raised the idea because Anaya did not have a cell phone that would enable her to call the office before arriving. Despite Anaya's claim that her access to the garage was critical, she testified she did not follow up with Kelly.

The Sixth and Seventh Causes of Action Have No Merit

Government Code section 12940, subdivision (k) provides that it is an unlawful employment practice "[f]or an employer, labor organization . . . to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring." Anaya's sixth cause of action, entitled failure to prevent discrimination and/or

harassment, is based on that subsection. However, before Anaya can prevail on that claim, she must demonstrate actual discrimination or harassment. (*Dickson v. Burke Williams, Inc.* (2015) 234 Cal.App.4th 1307, 1314.) Failing this, she has no claim. (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 287–289; CACI No. 2527.)

As discussed above, Anaya has not demonstrated discrimination. So, this cause of action turns on Anaya's ability to demonstrate harassment. A required element of harassment is that the conduct complained of must have been sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment. It must interfere with a reasonable employee's work performance, and seriously affect the psychological well-being of a reasonable employee, who must prove she was actually offended. (*Aguilar v. Avis Rent A Car System* (1999) 21 Cal.4th 121, 130; *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608; *Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 464–465; CACI Nos. 2521A, 2521B.) As Anaya herself describes it, "Whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances including the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance. *Lyle v. Warner Brothers* (2006) [38] Cal.4th 264." Anaya's showing does not measure up.

Anaya's brief describes the "claimed hostile work environment" as follows: "Ms. Anaya testified in her deposition that she was subjected to a [*sic*] abusive and threatening work environment by Eric Hall, a fellow UESF employee. Mr. Hall would 'throw' 'books' and yell. [Citation.] On one particular occasion, Mr. Hall referred to Ms. Anaya as 'Fucking Darlene.' [Citation.] Mr. Hall frequently used profanity in the office, 'Jesus, fucking Christ' and 'God damn it.' [Citation.] Mr. Hall is a large man and was described in deposition testimony as being 'six feet, maybe six-one . . . .' [Citation] Ms. Anaya emailed Mr. Kelly that, 'This bullying is a return to what occurred last year when I began work at UESF, dismissive and condescending remarks and yelling were

aimed at me.' [Citation.] [¶] After this conduct, Ms. Anaya did not feel safe being in the office alone with Mr. Hall. [Citation.] Ms. Anaya testified that she was subjected to this harassment by Mr. Hall because she was a woman and that Mr. Hall was emboldened to mistreat Ms. Anaya because she was treated as 'person [*sic*] non grata' by Mr. Kelly. [Citation.] In her deposition, Ms. Conley acknowledged that she had personally seen Eric Hall angry and had seen Mr. Hall cuss. [Citation.] Mr. Kelly acknowledged in his deposition that he had personally seen Eric Hall use profanity and that Mr. Hall does 'become passionate.' "

While Hall's language is not to be condoned, it is not enough to demonstrate unlawful harassment, as it is not sufficiently severe or pervasive to alter the conditions of Anaya's employment and create an objectively abusive working environment. (*Rehmani v. Superior Court* (2012) 204 Cal.App.4th 945, 951.) But even if it were, Anaya does not demonstrate that the language used was in connection with any protected characteristic. (*Serri*, *supra*, 226 Cal.App.4th at p. 871 [to prevail on a harassment claim, a plaintiff must link the conduct to a protected characteristic]; CACI No. 2521A.) And finally, Anaya admitted at deposition that Kelly told her he would talk to Hall about his conduct after she complained about Hall, and defendants offered evidence showing that Kelly engaged in reasonable follow up with Hall in response to Anaya's complaints about him. This negates Anaya's claim.

In light of our resolution of the issues as above, concluding that none of Anaya's claims has merit, we need not discuss the issue of whether Kelly could be personally liable for any of Anaya's claims.

DISPOSITION

The judgment is affirmed. Defendants shall recover their costs on appeal.

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Richman, J.

We concur:

_____
Kline, P. J.

_____
Stewart, J.

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